90-256

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Plaintiff was awarded its entire attorney's fees in this diversity case—slightly over $1,000,000. Since the controlling state law provided no basis for the award, and in fact positively would not have allowed it, the award was granted under the "inherent power" of the court pursuant to the "bad faith" exception to the general American rule against fee shifting.

1. What, if any, is the scope of a federal court's "inherent power" to shift the entire burden of attorney's fees? Does it include the ability to shift fees in a diversity case in contravention of the law of the forum state?

2. If so, what are the limitations upon the exercise of this "inherent power?" For example, if the award is authorized as a "sanction," are the general requirements imposed upon an award of "sanctions," such as the prohibition against massive post-judgment retributive sanctions not reasonably tailored to the wrong sought to be redressed, operative? Can the award include reimbursement for expenses incurred before appellate courts and administrative agencies because of conduct not deemed "frivolous" by those higher courts or agencies? Can the award include reimbursement for fees incurred by a party who fails to mitigate his or her expenses? Does the general attorney's fees award requirement of "reasonableness" apply? Additionally, are due process requirements and the prohibition against excessive fines relevant?

RULE 14(b) AND 29.2 STATEMENTS

The following persons and entities were parties below, but are neither petitioners nor respondents herein:

1. Calcasieu Television and Radio, Inc.
2. A.J. Gray, III
3. Edwin A. McCabe
4. Richard A. Curry
5. Mabel C. Baker

There are no parent or subsidiary companies of petitioner to be listed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.

G. RUSSELL CHAMBERS

v.

NASCO, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. Russell Chambers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (App., 59a-83a) is reported at 894 F.2d 696. The Opinion of the United States District Court for the Western District of Louisiana (App.,1a-58a) is reported at 124 F.R.D. 120.

JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on February 6, 1990. A timely petition for rehearing was denied on May 4, 1990. (App., 84a-85a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides in full as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> . . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. Section 1927 of Title 28 of the United States Code (28 U.S.C. § 1927) provides in full as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally such excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

4. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

On August 9, 1983, NASCO, INC. ("NASCO") and Calcasieu Television and Radio, Inc. ("CTR") entered into an agreement (the "Purchase Agreement") to buy and sell

some of the assets used in the operation of KPLC-TV, the NBC affiliate in Lake Charles, LA, for $18,000,000. The Purchase Agreement was signed on behalf of CTR by its president, G. Russell Chambers ("Chambers"). When CTR refused to specifically perform, and instead offered to pay damages, NASCO filed suit in the United States District Court for the Western District of Louisiana requesting specific performance and damages. Jurisdiction was predicated upon the diversity of the citizenship of the plaintiff (NASCO) and the defendants (CTR and Chambers).

Following trial, CTR and Chambers were ordered to specifically perform the Purchase Agreement. *See* 623 F.Supp. 1372. The United States Court of Appeals for the Fifth Circuit issued a *per curiam* affirming the trial court, and finding that the appeal was frivolous under Federal Rule of Appellate Procedure 38. The Court fixed damages to be double costs, and the "appellee's attorneys' fees, if reasonable, expended in the prosecution of this appeal." Additionally, the Court of Appeals remanded "for a determination of whether sanctions in the form of costs and attorney's fees should be imposed against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for the appellants under 28 U.S.C. § 1927 as it relates to the proceedings in the district court." *See* 797 F.2d 975.

NASCO and CTR then closed the sale of the KPLC-TV assets, and settled a claim by NASCO for delay damages for $850,000. NASCO and CTR were prevented from settling a claim for attorney's fees because the trial court made it known that the matter of sanctions was its exclusive domain, and that it would not approve any such settlement.

Sixteen months following the Court of Appeals' remand, NASCO filed a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions. NASCO prayed that the court fix the amount of the sanction impos-

ed by the appellate court for the frivolous appeal. Additionally, NASCO went beyond the mandate of the appellate court and prayed that the trial court impose sanctions "including, but not limited to, all attorney's fees, expenses, and costs incurred by NASCO in these proceedings, and in the administrative proceedings before the F.C.C." Since neither Rule 11 nor 28 U.S.C. § 1927, the two bases for sanctions specified in the remand order by the Fifth Circuit Court of Appeals, were sufficient to authorize the trial court to grant the relief requested by NASCO, NASCO urged the trial court to award it all of its attorney's fees incurred in the entire proceeding under the "inherent power" of the court. Included as defendants were Chambers' attorneys, A. J. Gray, III and Edwin A. McCabe, Mabel C. Baker, Chambers' sister and another defendant, and her attorney, Richard A. Curry.

Following hearing, the trial court granted NASCO's motion, and sanctioned all parties named as defendants in NASCO's Motion. Mabel Baker was reprimanded; Gray was disbarred from the Western District of Louisiana, with no ability to reapply for admission for three years; McCabe was declared ineligible to practice in the Western District for five years; and Curry was suspended from practice in the Western District for six months. (App., 54a, 55a, 56a). Judgment was entered against Chambers personally in the sums of $66,286.65, representing the amount of the sanctions imposed by order of the United States Court of Appeals for the Fifth Circuit, and $996,644.65, representing the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter. (App., 52a). Finding Rule 11 and 28 U.S.C. § 1927 inappropriate for its purposes, the trial court relied exclusively upon its "inherent power" in imposing these sanctions, including the award of attorney's fees. (App., 42a-47a).

The United States Court of Appeals for the Fifth Circuit affirmed. The court rejected Chambers' argument that the trial court did not possess the "inherent power" to

award attorney's fees because Louisiana law, the controlling law, did not allow such an award. Instead, the court found that federal courts always possess the "inherent power" to shift the full burden of attorney's fees in order to police against abusive litigation practices. (App., 72a-78a). The court also rejected Chambers' argument that the general rules governing sanctions, such as the requirements of swiftness, mitigation, and reasonable relation to wrong, should apply to the award. Instead, the court found that the existence of "vertical" powers, such as those granted to the courts by Rule 11 or 28 U.S.C. § 1927, does not constrain the courts from exercising "horizontal" powers, such as the "inherent power" to shift attorney's fees. (App., 69a-72a).

REASONS FOR GRANTING THE PETITION

There is no dispute in this diversity case that the attorney's fee award is completely contrary to Louisiana law. Under *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and the unbroken chain of cases that have applied it faithfully without deviation, the Court of Appeals' job in this case should have been a simple one– reversal of the sanction. Instead of following well established precedent, the Court of Appeals charted a bold new course for the federal courts, finding that there is an "inherent power" to shift the entire burden of attorney's fees in a case unrelated to the substantive award of attorney's fees permissible under the "bad faith" exception to the general American rule. The Court of Appeals held that the burden of attorney's fees can be shifted on procedural grounds to "vindicate the judicial authority of the court" and to "prevent abuses of the court's processes." There is absolutely no question that courts possess the inherent power *necessary* to accomplish these two aims. But, under all of the rules that govern sanctions, the massive post-judgment, retributive, untailored award made in this case does not qualify as a valid exercise of the court's inherent power. It serves no useful purpose

as a sanction, and acts only to chill legitimate zealous advocacy.

A. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEALS, AND OF OTHER DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS

The general American rule regarding attorney's fees is that each party shall bear his or her own, a rule which displaces any "roving authority" to assess attorney's fees "whenever the courts might deem them warranted." *Alyeska Pipeline Service Company v. Wilderness Society, supra,* 421 U.S. at 260, 95 S.Ct. at 1623. The circumstances under which attorney's fees are to be awarded "are matters for Congress to determine." Therefore, the "courts are not free to fashion drastic new rules" with respect to attorney's fees. *Id.,* 421 U.S. at 262, 269, 95 S.Ct. at 1624, 1627.

This is not to say that under certain "limited circumstances" federal courts do not possess the "inherent power" to award attorney's fees absent legislative authority. Fees may be shifted under certain guardedly circumscribed judicially recognized common law exceptions to the general American rule, one of which is upon a finding of bad faith, vexatious or oppressive conduct. *Id.,* at 421 U.S. 257-59, 95 S.Ct. at 1621-1623. Indeed, there have been many situations where this Court has recognized the "bad faith" exception, and has granted attorney's fees in federal question cases. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (civil rights case); *F. D. Rich Company, Inc., v. United States for Use of Indus. Lumber Co., Inc.,* 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974)(Miller Act case); *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 1263 (1973)(LMRBA Case); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(civil rights case); *Fleischmann Distilling Corp. v. Maier Brewing Company,* 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)(LANHAM Act case);

Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)(admiralty case).

However, federal courts are not free to apply this common law exception in every case. As this Court noted when it first expounded upon the existence and nature of the "bad faith" exception:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

Alyeska Pipeline Service Company v. Wilderness Society, supra, 441 U.S. at 259 n.31, 95 S.Ct. at 1622 n.31. The rationale has been explained thusly:

> [T]he same considerations which formed the foundation of *Hanna* and the line of cases following *Erie* would apply, of necessity, were a federal court to engraft federal notions of attorneys' fees awards onto state substantive rights tried in a diversity action. It is apparent that permitting an award of attorneys' fees in a federal court but denying them for an identical action brought in a state court would represent a significant reason to choose a federal forum. Even if we assume that this difference could be restricted to cases involving obdurate conduct or bad faith, it is clear that the possibility of such an award in many cases would color the substantive aspects of the case and could significantly alter the legal theories presented by the parties as a claim or defense. Under *Erie* and *Hanna*, such a federal shaping of the state substantive right is unwarranted.

Ward & Company, Inc. v. Pacific Indemnity Company, 557 F.2d 51, 58 n.9 (3rd Cir. 1977), citing *Hanna v. Plummer*, 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965) (emphasis added; footnote omitted).

Accordingly, with the sole exception of the case *sub judice*, the federal trial and appellate courts have consistently applied this Court's statement in *Alyeska*, and have held that in a diversity case, attorney's fees cannot be awarded on the basis of the court's inherent power under the "bad faith" exception unless that exception is recognized by the applicable state law. *See First State Underwriters Agency of New England Reinsurance Corp. v. Travelers*, 803 F.2d 1308, 1317 (3rd Cir. 1986), finding that Pennsylvania's "bad faith" exception governed the award of attorney's fees in a diversity contract action; *Nepera Chemical, Inc. v. Sea-Land Service, Inc.*, 794 F.2d 688 (D.C. Cir. 1986) applying District of Columbia law in a diversity action to determine whether attorney's fees could be awarded as punishment for bad faith, vexatious, wanton or oppressive behavior; *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1508 (11th Cir. 1985), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2267, 90 L.Ed.2d 712 (1986), rejecting a claim for attorney's fees predicated upon the "bad faith" of the plaintiff in the way it "initiated and conducted" the litigation because the "bad faith exception is not recognized in the Florida jurisprudence;" *Barton v. Drummond Co.*, 636 F.2d 978, 985 (5th Cir. 1981), finding that federal law did not control the issue of whether attorney's fees were awardable for bad faith conduct in the course of, and prior to, the litigation because the case was a diversity action, but concluding that attorney's fees were authorized by Alabama Law; *Perkins State Bank v. Connolly*, 632 F.2d 1306, 1310, 1312 (5th Cir. 1980), holding that the inherent power of a federal court to shift fees under the "bad faith" exception does not supersede state law in a diversity case, and reversing an award of attorney's fees made under the "bad faith" exception because it was not authorized by Florida law; *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 773 n.21

(2d Cir. 1980), reversing an award of attorney's fees made on the basis of the "bad faith" exception because New York law did not authorize the award; *Montgomery Ward & Company, Inc. v. Pacific Indemnity Company, supra*, holding that attorney's fees could not be awarded under the "bad faith" exception unless that exception was recognized by Pennsylvania law; *Tryforos v. Icarian Development Company, S.A.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976), noting that the "unquestioned power" of a federal court to award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons could not be exercised by a federal court in a diversity case unless such an exercise is permitted by state law. *See also City of Philadelphia v. Fidelity and Deposit Company of Maryland*, 1987 WL 15432 (E.D. Pa. 1987), recognizing that Pennsylvania, not federal, law controlled on the question of whether attorney's fees could be awarded under the "bad faith" exception; *Miller v. Cudahy Company*, 656 F.Supp. 316, 336 (D.C. Kan. 1987), *aff'd in part*, 858 F.2d 1449 (10th Cir. 1988), recognizing that state law controlled the awardability of attorney's fees in diversity cases under the "bad faith" exception, but noting that Kansas had no rule of law on the subject; *Watson v. Ferguson*, 1986 WL 5202 (N.D. Ill. 1986), applying Illinois' statutory version of the "bad faith" exception because "a federal court sitting in diversity should apply state statutes" regarding attorney's fees; *William Shapiro v. American Home Assurance Company*, 1985 WL 3033 (E.D. Pa. 1985), examining Pennsylvania law for application of the "bad faith" exception because "as this is a diversity case, any award of attorney's fees must have a basis in the law of the relevant state;" *Brady v. Hartford Fire Insurance Company*, 610 F.Supp. 735 (D.C. Md. 1985), applying Maryland's version of the "bad faith" exception in a diversity case; *Friends of All Children, Inc. v. Lockheed Aircraft Corporation*, 587 F.Supp. 180, 188 (D.C.D.C. 1984), *aff'd*, 746 F.2d 816 (D.C. Cir. 1984), refusing to award attorney's fees under the "bad faith" excep-

tion because "jurisdiction in these cases is by diversity, . . . and the law of the District of Columbia does not now appear to permit an award of attorney's fees even under the extreme circumstances alleged here;" *P. Liedtka Trucking, Inc. v. James H. Hartman and Son, Inc.* 537 F. Supp. 381, 382 n.1 (E.D. Pa. 1982), *aff'd*, 709 F.2d 1491 (3rd Cir. 1983), applying the statutory version of the "bad faith" exception contained within Pennsylvania law because "where state law provides such a right, attorney's fees may be assessed by a federal court in a diversity case;" *Chicago Regional Fort District v. Ferroslag, Inc.*, 531 F.Supp. 401, 401-02 (N.D. Ill. 1982), holding that the court was not "free to exercise its 'inherent power' to tax a party with fees on the basis" of the bad faith exception because "Illinois not federal law provides the rule of decision;" *Bass v. Spitz*, 522 F.Supp. 1343, 1358 n.28 (E.D. Mich. 1981), rejecting a claim for attorney's fees for defense of a state law diversity claim made under the "state law counterpart of the 'bad faith' exception" because the court found "no Michigan statute or court rule which would authorize recovery of attorney's fees on this basis;" *McKinney v. Gannet Co., Inc.*, 660 F. Supp. 984, 1025 (D.C.N.M. 1981), *appeal dismissed*, 694 F.2d 1240 (10th Cir. 1982), refusing to award attorney's fees under the "bad faith" exception because it "has not been adopted in New Mexico."

In the instant case, there was no room for a finding, as was made in some of the cases cited above, that the "bad faith" exception was recognized and applied by the law of the forum state. The Court of Appeals correctly noted that Louisiana does not recognize the "bad faith" exception and steadfastly will not allow fee shifting in the absence of statute or contract, even through use of the "inherent power" of the court. (App., 67a). *See also Marvirazon Compania Naviera, S.A. v. H. J. Baker & Brothers, Inc.* 674 F.2d 364, 368 (5th Cir. 1982); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756, 763 (La. 1985). Louisiana does not award attorney's fees for "bad faith" breach of contract. *See Ogea v. Loffland Brothers Company*, 622

F.2d 186, 190 (5th Cir. 1980); *Rutherford v. Impson*, 366 So.2d 944, 947 (La. App. 1st Cir. 1978), *writ denied*, 369 So.2d 140 (La. 1979). The only measure of damages is "the loss sustained by the obligee and the profit of which he has been deprived." La. Civ. Code art. 1995 (1984). Moreover, the underlying rationale of the "bad faith" exception, which is punishment, *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946, is inconsistent with Louisiana's prohibition of punitive damages. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).

Given the wealth of authority on point, at every level of the federal judiciary from its very top to the bottom, the decision of the Court of Appeals should have been a preordained *per curiam* reversing the trial court's grant of attorney's fees under the "inherent power" of the court to shift fees under the "bad faith" exception to the general American rule. Every court that has ever considered the question has held that state law controls, and has either refused to shift fees because state law did not recognize the "bad faith" exception, or has shifted fees upon a finding that state law did recognize the "bad faith" exception. No court has ever shifted fees under the "bad faith" exception after an express finding that this exception was not recognized under the relevant state law.

But, with the comment that this Court "confused" the issue in *Alyeska*, the Court of Appeals, with no authority whatsover,[1] dispensed with *Alyeska* and its mountainous progeny, upon a rumination that this Court did not

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1. The Court of Appeals states that federal courts have not been "even in their treatment of the issue."(App., 73a) The *concurring* opinion by Judge Gibbon in *Montgomery Ward & Co., Inc. v. Pacific Indenmity Co., supra*, and the *magistrate's* opinion in *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980), the only two cases cited by the Court of Appeals in support of its holding, hardly supply succor for this statement. Moreover both of these views are pure *dictum* because both Judge Gibbons and the magistrate preceded their ruminations with a finding that state law authorized an award of attorney's fees.

"intend" what it plainly said. (App., 67a-68a) But, the "plain meaning" of *Alyeska* is that state law governs attorney's fee awards in diversity actions, even in cases of bad faith litigation. *Montgomery Ward & Co., Inc. v. Pacific Indemnity Co., supra*, 557 F.2d at 56. If *Alyeska* "means" something else, that is a matter for this Court to declare, not for the Court of Appeals to speculate upon.

B. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS SETS BAD PRECEDENT IN THAT IT AUTHORIZES FEDERAL COURTS TO EXERCISE THEIR INHERENT POWERS IN A MANNER THAT IS BOTH UNNNECESSARY TO THE EFFECTIVE OPERATION OF THE COURTS AND CONTRARY TO THE PRINCIPLES THAT HAVE BEEN EXTABLISHED TO PREVENT THE IMPOSITION OF "SANCTIONS" FROM UNDULY CHILLING THE RIGHTS OF LITIGANTS TO ENGAGE IN LEGITIMATE ZEALOUS ADVOCACY.

Finding no comfort for its decision in the "bad faith" exception to the general American rule against fee shifting as that exception has been recognized and applied by this Court and other federal courts in diversity cases, the Court of Appeals was forced to chart a bold new course for the federal courts. Without citation of authority, the court espoused the view, "nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs and the shifting of fees." (App., 68a). Given the existence of this reservoir of power, the court theorized that there is no barrier to fee shifting in a diversity case even if the shift is contrary to state law when it "is not a matter of substantive remedy, but of vindicating judicial authority." (App., 77a). In so holding, the Court of Appeals drew a substantive/procedural dichotomy with regard to awards of attorney's fees, and held that awards of fees made under a procedural mantle do not implicate the *Erie* doctrine because *Erie* does not require courts to "tolerate litigation abuses," or "limit the range of measures at the

court's disposal to vindicate its authority." (App., 77a).

This holding is unprecedented, flawed and dangerous. No court has ever recognized that the power of a court to assess attorney's fees is contingent upon the *purpose* of the award.[2] The Court of Appeals' holding to that effect reflects a miscomprehension of the nature and purpose of the "inherent power" of the federal courts to shift fees. It unduly confuses the concept of a "sanction" with shifting the burden of attorney's fees, and allows a court to award the latter under the guise of the former. The ultimate effect is that the court's power to redress specific abuses of process becomes an instrument of retribution. Nothing is served. The ultimate goal of deterrence is sacrificed in favor of making the party injured by the other's bad faith whole, which has the ultimate effect of closing the courts by chilling what might otherwise be permissible zealous and legitimate advocacy.

1. It is beyond peradventure that federal courts possess certain "inherent powers." These are the powers that "are necessary to the exercise of all others," *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, that is, those "necessary to permit the courts to function." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819, 107 S.Ct. 2124, 2144, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring). *citing United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). These powers include the contempt power, *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), and the power to

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2. At least one court has expressly rejected such an argument. *See First State Underwriters Agency of New England Reinsurance Corporation v. Travelers Insurance Company, supra*, 803 F.2d at 1318 ("Whether categorized as primarily substantive or primarily procedural for purposes of conflicts analysis, the right to attorney's fees cannot be examined in a vacuum. Rather, the body of law regarding the resolution of the contract claims includes the right to attorney's fees and must be examined as a whole.")

dismiss a claim *sua sponte* for lack of prosecution, *Link v. Wabash Railroad Company,* 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

The "inherent powers" belong to three tiers: (1) irreducible inherent power that derives from Article III of the Constitution; (2) absolutely essential powers that arise from the nature of the court; and (3) powers that are necessary only in the sense of being useful. Powers of the first tier are available to the courts even in the face of contrary legislative direction. The second tier represents powers which can be legislatively regulated, but not abridged or abrogated. To the third tier belong powers which can be exercised only in the absence of contrary legislative direction — they exist at legislative whim. This last category is composed of powers that are necessary, but "necessary" only "in the practical sense of being useful." *See Eash v. Riggins Trucking Company,* 757 F.2d 557, 562-63 (3rd Cir. 1985) (en banc).

While this Court has not formally classified the "inherent powers," it has nonetheless made it clear that the power to shift attorney's fees is of the third tier. In *Alyeska Pipeline Company v. Wilderness Society, supra,* this Court expressly recognized that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262, 95 S.Ct. at 1624. The "inherent power" to shift fees, such as under the "bad faith" exception, only exists "unless forbidden by Congress." 421 U.S. at 359, 95 S.Ct. 1622.

Given that the power to shift fees, even under the "bad faith" exception, is one that can be regulated by Congress, it is not surprising that it finds its source and purpose in something other than its own "necessity," as was found by the Court of Appeals. (App.,69__a).

> This third category of inherent powers has sometimes been said to be 'rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion. . . . [S]uch power is necessary only in the sense of being highly useful in the pursuit of a just result.

Eash v. Riggins Trucking Company, supra, 757 F.2d at 563, *citing ITT Community Development Corporation v Barton,* 569 F.2d 1351, 1359 (5th Cir. 1978). The power can be traced to 17 Rich. II, c.6, which provided that the Chancellor should award damages (including costs) according to his discretion against persons bringing vexatious and unfounded suits in chancery. This power was thought to be "so far inherent in the equity court as to be inseparable from the exercise of its judicial authority." Therefore, "from the beginning" chancery courts were imbued with the "inherent power" to award fees for suits that were "false, unjust, vexatious, wanton, or oppressive." Battey, *Rule 11 Sanctions: Some Current Observations,* 33 S.D.L.R. 207, 207 & n.2 (1987-88), *citing Guardian Trust Co. v. Kansas City Southern Ry. Co.* 28 F.2d 233, 240-41 (8th Cir. 1921). The federal court's power to award attorney's fees for bad faith conduct "is part of the original authority of the chancellor to do equity in a particular situation. . . ." *Hall v. Cole, supra,* 412 U.S. at 5, 93 S.Ct. at 1946. *See also Alyeska Pipeline Services v. Wilderness Society,, supra,* 421 U.S. at 279-80, 421 U.S. at 1632-33 (Brennan, J. dissenting), *citing Vaughan v. Atkinson, supra.*

This historical background of the "bad faith" exception does not bode well for the Court of Appeals' contention that a federal court has the unbridled power to shift the entire burden of attorney's fees whenever it feels the need to vindicate its authority, or for some procedural purpose. Courts do not possess the "inherent power" to shift the entire burden of attorney's fees to achieve the procedural goal of vindicating their authority; they possess it to do equity

between the parties. If the former was the case, and punishment the objective, the Rules Enabling Act may well serve as a limit of the court's "inherent authority." *See* Untereiner *A Uniform Approach to Rule 11 Sanctions* 97 Yale L.J. 901, 908 at n.51 (1988) (questioning the authority of the judiciary to promulgate rules shifting fees for the purpose of punishment and compensation); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11* 32 Vill. L.R. 575, 584 & n.28 (1987) (questioning whether the punishment of abusive lawyers is a proper procedural concern or within the authority granted by the Rules Enabling Act). If the latter was not the case, the court could shift fees whenever it felt the need to manage its docket or curb perceived abuses. But, it cannot. Even though courts possess the inherent powers "necessary to the exercise of all others," and to exert the "control necessarily vested in courts to manage their own affairs," such "inherent powers" are nonetheless limited by the general American rule, and the courts may only shift fees upon a finding of "bad faith," a "finding that would have to precede any sanction under the court's inherent powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 767, 100 S.Ct. at 2465. *See also Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93 (6th Cir. 1988), holding that a court did not possess the "inherent power" to enact a local rule authorizing awards of attorney's fees as part of a pretrial mediation scheme because "awarding attorney's fees is not merely a matter of procedural or judicial efficiency," and therefore courts are *Alyeska* bound to follow legislative direction in the shifting of attorney's fees absent one of the judicially recognized exceptions.

2. The right of a federal court to shift the entire burden of attorney's fees on procedural grounds is not an inherent power. It is not among those powers necessary for the vindication of its judicial authority, much less "necessary for the exercise of all others," *Roadway Express, Inc. v. Piper, supra,* 447 U.S. 764, 100 S.Ct. 2463, or essential to "permit the courts to function." *Young v.*

United States ex rel. Vuitton et Fils, supra, 481 U.S. at 819, 107 S.Ct. at 2144.

Courts do not need the ability to shift fees under the "bad faith" exception to function as a court or to exercise their other powers. In *Roadway Express, Inc. v. Piper, supra,* this Court did recognize that courts were possessed with the "inherent powers" that were "necessary to the exercise of all others" including the power, under the "bad faith" exception, to assess attorney's fees against counsel.[3] But, in the same opinion, this Court also held that attorney's fees could not be awarded under 28 U.S.C. § 1927, which authorized a court to tax "excess costs" against vexatious and obdurate lawyers. Since that time, 28 U.S.C. § 1927 has been amended to expressly authorize an award of "attorneys' fees reasonably incurred because of such conduct." Moreover,

> [s]anctions came into their own in the 1983 amendments to the Federal Rules of Civil Procedure. Explicit authority to award money sanctions, against lawyers as well as their clients, was written into rules 11, 16, and 26, and sanctions were made mandatory for violating rules 11 and 26.

Nelkin, *Sanctions under Amended Federal Rule 11 - Some "Chilling Problems" in the Struggle between Compensation and Punishment,* 74 Geo. L. J. 1313 (1986). These amendments filled the federal court's arsenal with a panoply of sanctions which may be levied for oppressive conduct short of a full shift of the entire burden of attorney's fees. *See* Fed. Rules Civ. Proc. 11, 16(f), 26(g), 30(g), 37(d), 37(g), 56(g). These provisions are more suited to protecting the

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3. In *Roadway Express,* Justice Blackmun explicitly noted in concurrence that this Court did not "explore the specific features of [the "bad faith"] exception. Most significantly, it does not address the permissibility of applying this new exception to award attorney's fees beyond those actually attributable to the culpable attorney's vexatious actions." 447 U.S. at 769, 100 S.Ct. 2465.

court from abuse of its processes than a shifting of the burden of attorney's fees under the "bad faith" exception because "the key to avoiding abuse of the litigation process is early and effective judicial management." Schwarzer, *Sanctions Under the New Federal Rule 11 - a Closer Look*, 104 F.R.D. 181, 204. Moreover, 28 U.S.C. § 1927 authorizes awards of attorney's fees against a vexatious attorney. Thus, the inability of a court to utilize the "bad faith" exception to correct procedural abuses in a diversity case when not recognized by the law of the forum state "does not mean that the federal forums are to become a haven for the obdurate and the vexatious." *Montgomery Ward & Company, Inc. v. Pacific Indenmity Company, supra*, 557 F.2d at n.9.

In the case below, the trial court could not have found the need to impose the sanction of attorney's fees in order to vindicate its judicial authority. At the time the award at issue was finally made, fifteen months after a final decision on the merits, the court did not need vindication — its work was done, and it had not found the need to sanction anyone while that work was being accomplished, except for a single contempt citation. The record shows that the trial court was very well aware of its power to impose sanctions, and it found that use of this power was unnecessary. Warnings and the shaping of issues had been sufficient to police itself against abuse and vindicate its authority. It was only the mention by the Court of Appeals in its remand order of the possibility of sanctionable conduct that spurred the trial court to decide that sanctions were indeed in order. Then, it dredged up six years of conduct long under the bridge, and punished Chambers for all of it.[4] Given the course of this proceeding, it is difficult to

4. While Chambers is well aware that at this stage of the proceedings the issue is long foreclosed, he would be remiss at least to himself in not simply stating for the public record that he continues to steadfastly maintain that the scurrilous attacks on his character contained in the trial court opinion have absolutely no basis in fact.

understand the Court of Appeals' attempt to justify the award of attorney's fees made by the trial court under the "inherent power" of the court to "control its courtroom." (App., 77a). Having foregone use of the panoply of sanctions available to it to stop the abuses that it perceived were occurring during the course of the litigation, it is less than clear how the trial court's imposition of the $1,000,000 "sanction" of NASCO's full breath of attorney's fees was a matter of the strict "functional necessity" that the Court of Appeals found is at the heart of a court's "inherent powers."(App., 69a).

3. In fact, the award made in this case is at cross purposes with the proper exercise of a court's inherent power to manage its own docket, promote efficiency, and deter abuses of process. The massive post-judgment, untailored and unfocused aspects of the award made in this case render it both inappropriate and dangerous as a "sanction" imposed under the "inherent powers" of a court.

A distinction is to be drawn between the imposition of a "sanction" that requires a party to reimburse those attorney's fees attributable to some conduct below an appropriate standard, and the shifting of the entire burden of attorney's fees for the purpose of making the injured party whole. Sanction rules, such as Rule 11, "are not fee shifting statutes." *Cooter & Gell v. Hartmarx Corporation*, __U.S.__, 110 S.Ct. 2447, 2462, 58 USLW 4763 (1990). Their purpose is "not reimbursement, but sanction." *Pavelic & LeFlore v. Marvel Entertainment Group*, __U.S.__, 110 S.Ct. 456, 459, 58 USLW 4038 (1989), The line between the two may not always be clear. *See Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987)("There is no clear line between attorney's fees as damages and attorney's fees as sanctions.") Nonetheless,

there are characteristics that distinguish a "sanction" from a shift of attorney's fees.[5]

A primary distinction is a question of timing:

> It is a precept that sanctions must be imposed within a time frame that has a nexus to the behavior sought to be deterred.... Sanctions should not amount to an 'accumulation of all perceived misconduct, from filing through trial,' resulting in 'single post-judgment retribution in the form of a massive sanctions award.' The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end.

Thomas v. Captial Security Services, Inc., 836 F.2d 866, 881 (5th Cir. 1988) (en banc), *citing In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, __U.S.__, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987). "Early notice can deter continuing violations, thereby saving monetary and judicial resources." *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

> A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant santions. Such prompt action helps enhance the credibility of the rule, and, by deterring further abuse, achieve its therapeutic purpose.

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[5] While many of the observations that follow were made with regard to sanctions under Federal Rule of Civil Procedure 11, there is no reason why their compelling logic is not applicable to any sanction of attorney's fees imposed for the purpose of vindicating judicial authority or policing against litigation abuses. *See. e.g. Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988), adopting the Rule 11 limitations for sanctions imposed under the authority of 28 U.S.C. §1927 for "bad faith" conduct by attorneys.

In re Yagman, supra, 796 F.2d at 1183.

An unusually large post-judgment "sanction" is a sure sign of the failure of the sanctioning process to achieve deterrence, and of monetary and judicial waste. "If enforcement of the rule occurs expeditiously before much damage is done, . . monetary sanctions will ordinarily be modest." Schwarzer, *supra*, 104 F.R.D. at 203. But, when "abuses are allowed to pass unchecked, and, thus, undeterred," attorney's fees begin to accumulate. As a consequence, the court is "left faced with an unusually large sanctions amount that will, contrary to the policy, impart absolutely no deterrent value." The efficiency achieved by waiting to assess "sanctions" at the conclusion of the litigation is "paid for in wasted judicial resources and money." *In re Yagman, supra*, 796 F.2d at 1183.

The second precept of sanctions is that, in order to achieve their educational and rehabilitative purpose, sanctions should be "tailored to the particular wrong." *Thomas v. Captial Security Services Inc., supra*, 836 F.2d at 877. Attorney's fees, when awarded as a sanction, "ordinarily will not include compensation for the entire case." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99 (3rd Cir. 1988). The fees awarded must have been "reasonably incurred as a result of the violation." *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). "It is crucial that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1438 (7th Cir. 1987); *In re Yagman, supra*, 796 F.2d at 1184.

The requirement that sanctions be limited to those necessary to redress the wrongful conduct is natural for those imposed under the "inherent powers" of the court because the "traditional equitable authority" of the federal court extends "no farther than required by the nature and extent" of the violation that prompts its exercise. *General Building Contractors Association, Inc. v. Pennsylvania,*

458 U.S. 375, 398, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982), *citing Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). It would also seem to be a natural corollary to the principle that, because "inherent powers" are "shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, *citing Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450-451, 31 S.Ct. 492, 501-502, 55 L.Ed. 797 (1911). *See also* 6 Moore, Taggart, and Wicker, *Moore's Federal Practice* §54.78 [3] 54-508 (2d Ed. 1988), noting that courts possess the "inherent power" to award attorney's fees "made necessary by the unjustified conduct."

Three policies are fostered by requiring that sanctions be tailored to the wrong: (1) the educational purpose of the sanction is enhanced by letting judges pinpoint the abusive acts; (2) the deterrent effect is increased by making the imposition of the penalty for each infraction more certain; and (3) the possibility of abuse is reduced by eliminating the likelihood that a party will run up unreasonable costs and then petition for their reimbursement at the conclusion of the litigation. *St. Amant v. Bernard*, 859 F.2d 379, 382 n.12 (5th Cir. 1988).[6]

There is an additional reason why sanctions should be carefully tailored to the offense. While this Court has held that punitive damage awards are not subject to the Eighth Amendment's prohibition against "excessive

6. Several courts have held that even under the "bad faith" exception, which is a fee shifting rule, fees that have no relation to the complained of conduct should be excluded from the award. *Marshall v. Perez Arzuaga*, 828 F.2d 845, 852-53 (1st Cir. 1987), *cert denied*, 484 U.S. 1065, 108 S.Ct. 1027, 98 L.Ed.2d 991 (1987); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383 (2d Cir. 1985) *cert. denied*, 475 U.S. 1084, 106 S.Ct. 1464 (1986); *Lipsig v. National Student Marketing Corporation*, 663 F.2d 178, 181 n.21 (D.C. Cir. 1980); *Richardson v. Commercial Workers of America*, 530 F.2d 126, 133 (8th Cir. 1976), *cert. denied*, 429 U.S. 824, 97 S.Ct. 77 (1976); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127-29 (8th Cir. 1975) *cert. denied*, 423 U.S. 864, 96 S. Ct. 124 (1975).

fines," in so doing it noted that the Excessive Fines Clause does prohibit the imposition of "excessive monetary sanctions." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, __U.S.__, 109 S.Ct. 2909, 2920, 106 L.Ed.2d 219 (1989). In addition, this Court expressly left open the possibility that the Due Process Clause of the Fourteenth Amendment may place an outer limit on the size of a punitive damage award. *Id.*, at 2921, *citing Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 86, 108 S.Ct. 1645, 1654, 100 L.Ed.2d 62 (1988) (O'Connor, J., concurring). In the context of sanctions, it has been noted that, to avoid the possibility that the sanction will in effect constitute a criminal fine, requiring extensive due process safeguards, the sanction should be limited to "consequential expenses and attorney's fees., i.e., those incurred 'because' of the paper filed in violation." Schwarzer, *supra*, 104 F.R.D. at 2-2-203, *See also Donaldson v. Clark*, *supra*, 819 F.2d at 1559 n.10, 1561 ("It may be that the monetary sanction being considered in a specific case is so severe in amount or so arguably unrelated to the misconduct that due process will require extensive due process safegards as prerequisites to its imposition. . . . The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due."); *In re Yagman, supra*, 796 F.2d at 1880 ("If the amount of the sanction imposed is grossly disproportionate to the attorney's misconduct, or otherwise falls outside the bounds of the authority for the sanction, then the court should be cognizant of the possibility of a latent fine.") *See also Ray A. Scharer and Company, Inc., v. Plabell Rubber Products, Inc.*, 858 F.2d 317, 321 (6th Cir. 1988).

The third precept of sanctions is the "mitigation principle," limiting recovery to "those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, *supra*, 104 F.R.D. at 198, *See also Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988); *Thomas v. Capital Security*

Services, Inc. supra, 836 F.2d at 880; *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439; *In re Yagman, supra*, 796 F.2d at 1184. Mitigation is required to further the deterrent effect of the sanction. The sanction's purpose "would be frustrated if it encouraged the offended party to play the very game at which it is aimed." Schwarzer, *supra*, 104 F.R.D. at 201.

Finally, a true sanction should not be imposed by a court for conduct that does not occur before that court. For example, a trial court should not impose sanctions for a frivolous appeal or writs. *Sierra Club v. U.S. Army Corps of Engineers, supra*, 776 F.2d at 392; *Roth v. Pritikin*, 787 F.2d 54, 58-59 (2d Cir. 1986). "A rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court decision." *Emergency Beacon Corporation v. Montmartco, Inc.*, 790 F.2d 285 (2d Cir. 1986). This Court has recently recognized that, at least as far as sanctions are concerned, Federal Rules of Appellate Procedure 38 places "a natural limit on Rule 11's scope" because "the knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal." *Cooter & Gell v. Hartmarx Corporation, supra*, 110 S.Ct. at 2462. At least one court has applied the same principle to attorney's fees awards made under the "bad faith" exception. *See Morris by Rector v. Peterson*, 871 F.2d 948 (10th Cir. 1989).

The attorney's fees award approved by the Court of Appeals cannot by any stretch be viewed as an exercise of the court's "inherent power" to sanction litigants who abuse its processes because the award does not possess any of the characteristics of a sanction. To begin with, the award was made over sixteen months following the final determination of the merits of the litigation. No "sanctions" of attorney's fees were imposed during the entire six

year course of the case, while all of the perceived wrongs of discovery abuses, frivolous pleadings, unjustified requests for delay, etc. were occurring. Instead of exercising the powers that could hold this conduct in check, the trial court merely gave warnings that sanctions were available. But, a distinction is to be drawn between "the general notice about sanctions and notice that santions are being considered." *Tom Growney Equipment, Inc. v. Shelly Irrigation Development, Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987). The continued issuance of "warnings" without the actual imposition of sanctions could only have a salutary effect, leading the parties to believe that their conduct had not transgressed the permissible bounds. "Misconduct, once tolerated, will breed more misconduct." Schwarzer, *supra*, 104 F.R.D. at 205. Accordingly, the timing of the attorney's fee award prevented it from having any deterrent effect in this case. The sanctions award which was not requested or granted until long after the conclusion of this litigation, is far "more retaliatory than substantive in nature." *Stevens v. Lawyers Mutual Liberty Insurance Company*, 789 F.2d 1056, 1061 (4th Cir. 1986).

Nor is the attorney's fee award closely tailored to the perceived wrong. The "sanction" levied in this case contemplates reimbursement of every penny incurred by NASCO from drafting the complaint forward, including, incredibly, the closing costs incurred by NASCO — costs that the Purchase Agreement explicitly allocated to NASCO![7] It includes every penny expended by NASCO answering every pleading filed by CTR, even though the trial court explicitly found that "there was some legal basis for some of the defenses" asserted. (App., 33a). Such "round figuring" upon a mere finding that substantially all of NASCO's fees were attributable to CTR's wrongful conduct is "unsound" as a sanction because it does not allow for a comparison of the sanctions imposed and the perceived wrongful conduct. *In re Yagman, supra, 796 F.2d*

[7] Those costs were not insubstantial. One of the numerous law firms that represented NASCO alone billed $80,341.34 for the closing.

at 1165.

The attorney's fees could not have been tailored in this case. The proof of attorney's fees consisted of nothing more than invoices that reflected a whole month's worth of work at one time, with a single narrative describing the entire office effort. No breakdown was made of the time expended on any particular task, the cost or fee associated with that task, or even the person performing that task. There was simply no way for the trial court to determine whether the fees incurred by NASCO were "reasonable," as has been required by the landmark case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), expressly adopted by this court in *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983), or whether they were attributable to any wrongdoing. *See also Sidag Aktiengesellschaft v. Smoked Foods Products Company, Inc.*, 854 F.2d 799, 801 (5th Cir. 1988), expressly holding that the *Johnson* requirement applies to attorney's fees awarded under the "bad faith" exception.

No deduction was made in the attorney's fee award for NASCO's failure to mitigate its expenses. NASCO litigated for six years and did absolutely nothing to obtain a summary disposition of this case in the face of a single defense that the Court of Appeals found so frivolous as to merit a *per curiam* affirmance issued from the bench at oral argument and the immediate imposition of sanctions. Instead of hurrying this case along, NASCO filed endless motions and memoranda. "Clearly frivolous litigation may be rebutted quite simply without a flurry of documents." *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439. "If a baseless claim could have been readily disposed of by summary procedures, there is little justification for a claim for attorney's fees and expenses engendered in lengthy and elaborate proceedings in opposition." Schwarzer, *supra*, 104 F.R.D. at 201.

Nor does the sanction imposed by the trial court confine itself to conduct occurring before the trial court. The fine includes amounts incurred by NASCO before the Court of Appeals on writs and in prior appeals, before this Court on a request for stay, and before the Federal Communications Commission during administrative proceedings involving transfer of KPLC's license, all of which the trial court deemed to be frivolous.

The sheer size of the award made in this case, coupled with its failure to bear any relation to the amount of attorney's fees incurred by NASCO attributable to the wrongful conduct, raises Eighth and Fourteenth Amendment concerns. "The extraordinarily large assessment of expenses in this case appears to be unreasonable on its face." *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 516 (5th Cir. 1985). *See also In Re: Yagman, supra* ("$250,000 is a remarkably large monetary sanction—large enough to raise immediate suspicion.")

In short, the fee shift awarded in this case is the antithesis of a proper exercise of the court's power to prevent abuse of its process. Yet, the Court of Appeals has found a reservoir of "inherent power" to impose the award, even though it is contrary to the substantive law that controls this case and serves no valid procedural purpose. This sets a dangerous precedent.

> Fairnness to litigants who suffer from abuse, and others in the case load queue, depends in large part upon reducing the reluctance of lawyers to seek and judges to impose sanctions in proper circumstances. At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."

> The line between these equally important concerns is necessarily vague. Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court must be meticulously aware that this precarious balance can only be maintained if the sanctions are justly imposed. This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon. It also means that the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based. [Sanctions] that do not fall within these guidelines . . . pose a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy.

In re Yagman, supra, 796 F.2d at 1182-83.

There is no "inherent power" to shift the burden of attorney's fees, and to do away with the general American rule, on "procedural grounds." Such a power is not "necessary for the exercise of all other powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463. An attorney's fee award that does not reflect the careful tailoring that marks a "sanction" is, by its nature, an award of damages, implicating substantive law. It has no value as a sanction. As a device to "vindicate judicial authority," it is purely retributive. And,

> to allow punishment to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of its reasonableness, would send shivers through the bar.

In re Yagman, supra, 796 F.2d at 1185.

IX. CONCLUSION

G. Russell Chambers' petition for a writ of certiorari should be granted.

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